1993

Compulsory Arbitration of ADA Claims: Disabling the Disabled

Wendy S. Tien

Note

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When Robert, a young hearing-impaired engineer, joined the staff of a computer software firm in August 1989, he signed as a condition of his employment a contract that required him to submit all disputes arising from his employment to arbitration.[1] Three years later, after the firm had consistently denied Robert promotion despite excellent performance reviews, he sued the firm for employment discrimination in violation of the Americans with Disabilities Act ("ADA").[2]

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1. Arbitration is the voluntary submission of a dispute, by the parties to that dispute, to an impartial "judge" whose decision on the merits is final and binding. See generally FRANK ELKOURI & EDNA A. ELKOURI, HOW ARBITRATION WORKS 2-9 (4th ed. 1985) and FAIRWEATHER'S PRACTICE AND PROCEDURE IN LABOR ARBITRATION 1-22, 513-530 (Ray J. Schoonhoven ed., 3d ed. 1991) [hereinafter FAIRWEATHER'S ARBITRATION] for a thorough introduction to employment and labor arbitration. Commercial arbitration is the substitution by agreement of arbitration for judicial resolution of business disputes. ELKOURI & ELKOURI, *supra* at 3.

2. Americans with Disabilities Act of 1990, 42 U.S.C. §§ 12101-12213 (Supp. III 1991). Because the Americans with Disabilities Act ("ADA") only took effect in July 1992, this example of an employment discrimination claim is purely hypothetical. *See* Americans with Disabilities Act of 1990, Pub. L. No. 101-336, § 108, 104 Stat. 327, 337 (1990). Exhaustive studies of disabled individuals in the United States reveal that disabled Americans as a group "are much poorer, have far less education, have less social and community life, participate much less often in social activities that other Americans regularly enjoy, and express less satisfaction with life." H.R. REP. NO. 485, 101st Cong., 2d Sess., pt. 3, at 25 (1990), *reprinted in* 1990 U.S.C.C.A.N. 445, 447. Nowhere is the disparity between disabled America and mainstream America more pronounced than in the employment area:

> Individuals with disabilities experience staggering levels of unemployment and poverty. According to a recent Louis Harris poll "not working" is perhaps the truest definition of what it means to be disabled in America. Two-thirds of all disabled Americans between the age of 16 and 64 are [not] working at all; yet, a large majority of those not working say that they want to work. Sixty-six percent of working-age disabled persons, who are not working, say that they would like to have a job. . . . Translated into absolute terms, this means that about 8.2 million people with disabilities want to work but cannot find a job.

In the district court, the firm moved to compel dispute arbitration under section 2 of the Federal Arbitration Act ("FAA").[3] The firm argued that Robert voluntarily agreed to submit all disputes resulting from his employment to arbitration.[4] Robert contested the "voluntariness" of this agreement and further argued that public policy and section 1 of the FAA[5] precluded enforcement of the clause that stripped him of his statutory rights under the ADA.[6]

In the ADA, Congress provides that:

> [w]here appropriate and to the extent authorized by law, the use of alternative means of dispute resolution, including settlement negotiations, conciliation, facilitation, mediation, factfinding, minitrials, and arbitration, is encouraged to resolve disputes arising under this chapter.[7]

The Supreme Court has not yet decided whether the arbitration of employment discrimination claims is "authorized by law" under the FAA.[8] Further, arbitration of ADA claims may not be "appropriate" if the policies behind the ADA are inconsistent with compulsory binding arbitration.[9]

H.R. REP. NO. 485, 101st Cong., 2d Sess., pt. 2, at 32 (1990), *reprinted in* 1990 U.S.C.C.A.N. 303, 314 (citing LOUIS HARRIS & ASSOCIATES, THE ICD [INTERNATIONAL CENTER FOR THE DISABLED] SURVEY OF DISABLED AMERICANS: BRINGING DISABLED AMERICANS INTO THE MAINSTREAM 47-50 (1986)). Discrimination, noted the Committee on Education and Labor, reveals itself in many ways: standards and criteria that effectively deny job opportunities to disabled individuals; stereotypes, presumptions and myths about job performance; dead-end job placement; failure to provide equal promotion opportunities; and pre-employment screening for disabilities not relevant to job performance. *Id.* at 33, *reprinted in* 1990 U.S.C.C.A.N. at 315 (citation omitted). Because 43 million Americans are disabled within the meaning of the ADA, discrimination on the basis of disabilities has a detrimental effect on a large number of Americans. *See* BONNIE R. TUCKER & BRUCE A. GOLDSTEIN, LEGAL RIGHTS OF PERSONS WITH DISABILITIES: AN ANALYSIS OF FEDERAL LAW § 20:2 (1992) (citation omitted).

3. Act of February 12, 1925, ch. 213, 43 Stat. 883 (codified as amended at 9 U.S.C. §§ 1-14 (1988)).

4. *See* 9 U.S.C. § 2 (1988) (regarding enforcement of agreement to submit "a controversy" arising out of an arbitration contract).

5. 9 U.S.C. § 1 (1988); *see infra* notes 23-24 and accompanying text (discussing the FAA).

6. *See* 42 U.S.C. § 12117 (Supp. III 1991).

7. 42 U.S.C. § 12212 (Supp. III 1991).

8. In Gilmer v. Interstate/Johnson Lane Corp., 111 S. Ct. 1647 (1991), the most recent Supreme Court decision addressing the substantive arbitrability of statutory claims, the Court expressly reserved the question of whether § 1 of the FAA excludes all employment contracts. *Id.* at 1651-52 n.2.

9. For this substantive arbitrability test, see Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614 (1985), discussed *infra* notes 57-64 and accompanying text.

This Note examines the arbitration provision of the ADA in the context of the FAA, legislative history, and public policy. Part I discusses the FAA and the ADA, together with key cases that have treated the intersection of statutory claims and arbitration. Part II examines the policy objectives of the ADA and current attitudes toward arbitration, and argues that compulsory arbitration of ADA claims is inconsistent with both the general "employment contracts" exception to the FAA and central ADA policies. Part III concludes that although courts may not compel binding arbitration of ADA claims under either a collective bargaining agreement or an employment contract, the parties may agree to arbitration as part of the voluntary settlement of an ADA claim.

I. ARBITRATION AND THE ADA: A HISTORICAL PERSPECTIVE

A. TITLE I OF THE ADA

Congress enacted the ADA with some of the following purposes in mind:

> to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities; . . . to provide clear, strong, consistent, enforceable standards addressing discrimination against individuals with disabilities; . . . [and] to ensure that the Federal Government plays a central role in enforcing the standards established in [the ADA] on behalf of individuals with disabilities.[10]

Persistent discrimination against disabled individuals in housing, employment, and education provided the impetus for this legislation.[11]

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10. 42 U.S.C. § 12101(b)(1)-(3) (Supp. III 1991). By protecting individual rights, the ADA aims to further important social goals of equality and social awareness—i.e., that the ADA creates public rights. *See generally* Thomas v. Union Carbide Agric. Prod. Co., 473 U.S. 568, 585-86 (1985) (describing the nature of public rights and noting that public rights have been construed in the past to include those disputes arising out of the federal government's administration of its laws and programs); Nicholas W. Lobenthal, Comment, *The Arbitrability of ADEA Claims: Toward an Epistemology of Congressional Silence*, 23 COLUM. J.L. & SOC. PROBS. 67, 78-91 (1989) (identifying public rights as rights that advance public interests and not merely private ones, and proposing that when a statute embodies certain public rights, judicial resolution is preferable to arbitration).

11. 42 U.S.C. § 12101(a) (Supp. III 1991). In particular, Congress noted that "individuals with disabilities continually encounter various forms of discrimination, including outright intentional exclusion . . . [or] relegation to lesser . . . benefits, jobs, or other opportunities." 42 U.S.C. § 12101(a)(5).

Title I of the ADA[12] sets forth its employment provisions and generally prohibits an employer[13] from discriminating against a disabled employee who can perform the "essential functions" of her job,[14] with reasonable accommodations if required,[15] on the basis of her disability.[16] Perhaps the most salient feature of Title I, however, is its incorporation of the remedies from Title VII of the Civil Rights Act of 1964.[17] Title I allows the Equal Employment Opportunity Commission ("EEOC"), the Attorney General, or "any person alleging discrimination" in violation of Title I or subsequent regulations to invoke the powers, remedies, and procedures of Title VII.[18]

The original text of the ADA did not discuss arbitration. During debate, however, the House Committee on the Judiciary introduced section 513 to "encourage alternative means of dispute resolution that are already authorized by law."[19] The Committee stressed, however, that it intended only to supple-

12. 42 U.S.C. §§ 12111-12117 (Supp. III 1991).

13. 42 U.S.C. § 12111(5)(A) (Supp. III 1991). This provision parallels the definition of "employer" in Title VII, 42 U.S.C. § 2000e(b) (1988).

14. 42 U.S.C. § 12111(8) (Supp. III 1991).

15. The ADA defines "reasonable accommodation" to include improving the physical accessibility of the workplace, job restructuring, and other forms of facilitation such as supplying training materials or providing readers or interpreters. 42 U.S.C. § 12111(9) (Supp. III).

16. 42 U.S.C. § 12112(a) (Supp. III 1991). Discrimination on the basis of disability includes, among other things, attempts to classify disabled individuals in a way that affects their status or opportunity, failing to make reasonable accommodations absent a showing of undue hardship, or using tests and other standards that tend to screen out disabled individuals without providing an adequate defense. *Id.* § 12112(b). The employer may defend a charge that its hiring and promotion practices tend to screen out disabled individuals by demonstrating both that the disability is job-related and inconsistent with business necessity *and* that reasonable accommodation by the employer would not solve this problem. *Id.* § 12113(a).

17. 42 U.S.C. § 12117. Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e to 2000e-17 (1988 & Supp. III 1991), prohibits employment discrimination on the basis of race, color, religion, sex, or national origin. 42 U.S.C. § 2000e-2 (1988).

18. 42 U.S.C. § 12117 (Supp. III 1991). The powers, remedies, and procedures of Title VII are located in 42 U.S.C. §§ 2000e-4, 2000e-5, 2000e-6, 2000e-8 and 2000e-9 (1988 & Supp. III 1991). Some commentators believe that this sort of statutory remedial scheme exercises beneficial deterrent effects on subsequent illegal discrimination. *See generally* John J. Donohue III & Peter Siegelman, *The Changing Nature of Employment Discrimination Litigation*, 43 STAN. L. REV. 983 (1991) (empirical data on effects of employment discrimination laws on deterrence and victim willingness to bring suits).

19. H.R. REP. NO. 485, pt. 3, *supra* note 2, at 76, *reprinted in* 1990 U.S.C.C.A.N. at 499. The arbitration provision the Judiciary Committee introduced is codified at 42 U.S.C. § 12212 (Supp. III 1991).

ment remedies the ADA made available, not to replace them.[20] It observed that any agreement to arbitrate disputes arising under either a collective bargaining agreement or an employment contract would not foreclose an employee's statutory remedies but would instead provide a purely voluntary alternative mechanism for resolving disputes.[21] The Senate agreed to the House amendment in joint conference.[22]

B. THE FAA

In 1925, Congress passed laws governing compulsory binding arbitration of commercial disputes and set forth uniform federal standards of dispute resolution.[23] Section 2, later codified as the FAA,[24] stated:

> A written provision in any maritime transaction *or a contract evidencing a transaction involving commerce* to settle by arbitration a controversy thereafter arising out of such contract or transaction or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of

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20. *See* H.R. REP. NO. 485, pt. 3, *supra note* 2, at 76, *reprinted in* 1990 U.S.C.C.A.N. at 499. The Judiciary Committee also refused to preempt relevant state laws. *Id.* at 70, *reprinted in* 1990 U.S.C.C.A.N. at 493. The Committee further stated:

> Under Section 501(b) of the ADA, all of the rights, remedies and procedures that are available to people with disabilities under other federal laws, including Section 504 of the Rehabilitation Act, *or other state laws* (including state common law) are not preempted by this Act. This approach is consistent with that taken in other civil rights laws. The basic principle underlying this provision is that Congress does not intend to displace any of the rights or remedies provided by other federal or laws [sic] or other state laws (including state common law) which provide greater or equal protection to individuals with disabilities.

Id. (emphasis added).

21. *Id.* at 76-77, *reprinted in* 1990 U.S.C.C.A.N. at 499-500. To support this proposition, the Committee cited Alexander v. Gardner-Denver Co., 415 U.S. 36 (1974), a Title VII arbitration case in which the Court held that the right to a judicial forum under Title VII cannot be prospectively waived. H.R. REP. NO. 485, pt. 3, *supra* note 2, at 77, *reprinted in* 1990 U.S.C.C.A.N. at 500. The Committee further noted that because Title I of the ADA incorporates Title VII by reference, *Gardner-Denver* directly applies. *Id.*

22. *See* H.R. CONF. REP. NO. 595, 101st Cong., 2d Sess. 89 (1990), *reprinted in* 1990 U.S.C.C.A.N. 565, 598. Congressman Glickman, who introduced § 513, stressed the voluntary nature of alternative dispute resolution under the ADA. 136 CONG. REC. H2421, H2431 (daily ed. May 17, 1990) [hereinafter HOUSE RECORD]). Section 513, he noted, provided only a "reminder" that aggrieved parties could vindicate their rights while avoiding litigation through voluntary arbitration. *Id.*

23. Act of February 12, 1925, ch. 213, 43 Stat. 883 (codified at 9 U.S.C. §§ 1-14 (1988)).

24. 9 U.S.C. §§ 1-14 (1988).

> such a contract, transaction, or refusal, *shall be valid, irrevocable, and enforceable*, save upon such grounds as exist at law or in equity for the revocation of any contract.[25]

Section 1 of the FAA, provides an exception to section 2, however, noting that although

> "commerce", as herein defined, means *commerce among the several States* or with foreign nations, or in any Territory of the United States or in the District of Columbia, or between any such Territory and any State or foreign nation, or between the District of Columbia and any State or Territory or foreign nation . . . *nothing herein contained shall apply to contracts of employment of* seamen, railroad employees, or *any other class of workers engaged in foreign or interstate commerce.*[26]

The meaning of this exception to the FAA remains unresolved[27] because the Supreme Court has not defined the

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25. 9 U.S.C. § 2 (1988) (emphasis added).

26. 9 U.S.C. § 1 (1988) (emphasis added).

27. In *United Paperworkers International Union v. Misco, Inc.*, the Supreme Court resolved an early source of intercircuit conflict—whether "contracts of employment" under § 1 includes collective bargaining agreements. The Court, in the context of a collective bargaining dispute, observed that the FAA "does not apply to 'contracts of employment of . . . workers engaged in foreign or interstate commerce.' " 484 U.S. 29, 40 n.9 (1987) (citations omitted).

Based on *Misco*, the Sixth Circuit concluded that § 1's exclusion extends to labor contracts. Bacashihua v. United States Postal Serv., 859 F.2d 402, 404 (6th Cir. 1988). Other circuits had accepted this conclusion even prior to *Misco*. *See, e.g.*, American Postal Workers Union v. United States Postal Serv., 823 F.2d 466, 473 (11th Cir. 1987) (observing that "the position that collective bargaining agreements are not 'contracts of employment' within the meaning of the exclusionary language of the [FAA] . . . cannot be cited with any confidence as the current view of any of the federal courts of appeals").

Since *Misco*, however, the circuit courts have encountered the more difficult problem of whether "contracts of employment" includes employment provisions within a larger commercial contract. In Gilmer v. Interstate/Johnson Lane Corp., discussed *infra* notes 66-74 and accompanying text, the Court, deferring to lower court opinions, held that the part of a commercial agreement that concerned the arbitration of employment disputes was not a "contract of employment" under the FAA. 111 S. Ct. 1647, 1651-52 n.2 (1991). Justice Stevens disagreed with this interpretation, criticizing the majority for imposing too narrow a construction on "employment contracts." Justice Stevens noted that although both parties conceded that they entered into no "employment contract" per se, Interstate had *required* Gilmer to become a registered representative of securities exchanges as a condition of employment and thus had, in Justice Stevens's eyes, an employment contract with Gilmer. *Id.* at 1659 (Stevens, J., dissenting); *see also* Jennifer R. Dowd, *Enforcing Arbitration Agreements in Age Discrimination Suits*: Gilmer v. Interstate/Johnson Lane Corp., 33 B. C. L. REV. 435, 445 (1992) (noting that "[i]f employees like Gilmer can now inadvertently and unwittingly waive their rights to bring charges of employment discrimination by signing indirect contracts made with non-employers, then *Gilmer* raises cause for even greater concern.").

scope of "interstate commerce" in this context[28] and because the legislative history is, as one court lamented, "at best . . . vague and inconclusive."[29] The courts of appeals uniformly construe "commerce," as *generally* used in the FAA, as "coextensive with congressional power to regulate under the Commerce Clause"[30] but remain divided over whether this broad

28. *See, e.g.*, Gilmer v. Interstate/Johnson Lane Corp., 111 S. Ct. 1647 (1991); United Paperworkers Int'l Union v. Misco, 484 U.S. 29 (1987); Textile Workers Union v. Lincoln Mills, 353 U.S. 448 (1957).

29. Signal-Stat Corp. v. Local 475, United Elec., Radio & Mach. Workers, 235 F.2d 298, 302 (2d Cir. 1956), *cert. denied*, 354 U.S. 911 (1957). A committee of the American Bar Association ("ABA") drafted the FAA in response to ABA instructions to consider and report upon "the further extension of the principle of commercial arbitration." AMERICAN BAR ASS'N, 45 REPORT OF THE FORTY-THIRD ANNUAL MEETING OF THE AMERICAN BAR ASSOCIATION 75 (1920). Because of this, Congress devoted virtually all of the legislative history to commercial arbitration. Only three times does the history address labor or employment arbitration. Mr. Furuseth of the Seamen's Union originally proposed an amendment to the bill that would exclude "seamen" and "any other class of workers engaged in foreign or interstate commerce" from arbitration under the FAA, for fear that maritime employers could subvert admiralty law by forcing stevedores to arbitrate their labor disputes. AMERICAN BAR ASS'N, 48 REPORT OF THE FORTY-SIXTH ANNUAL MEETING OF THE AMERICAN BAR ASSOCATION 287 (1923) [hereinafter ABA REPORT]. W.H.H. Piatt, the chairman of the ABA committee responsible for drafting the FAA, responded to Furuseth's concern:

> It was not the intention of this bill to make an industrial arbitration in any sense; and so I suggest that in as far as the committee is concerned, if your honorable committee should feel that there is any danger of that, they should add to the bill the following language, "but nothing herein contained shall apply to seamen or any class of workers in interstate and foreign commerce." It is not intended that this shall be an act referring to labor disputes, at all.

Hearing on S. 4213 and S. 4214 Before the Subcom. of the Comm. on the Judiciary, 67th Cong., 4th Sess. 9 (1923) (statement of W.H.H. Piatt) [hereinafter *FAA Hearings*]. Senator Walsh remarked on the problem of compulsory labor arbitration:

> The trouble about the matter is that a great many of these contracts that are not entered into are not really voluntarily [sic] things at all. Take an insurance policy; there is a blank in it. You can take that or you can leave it. The agent has no power at all to decide it. Either you can make that contract or you can not make any contract. It is the same with a good many contracts of employment. A man says "These are our terms. All right, take it or leave it." Well, there is nothing for the man to do except to sign it; and then he surrenders his right to have his case tried by the court, and has to have it tried before a tribunal in which he has no confidence at all.

Id. (statement of Sen. Walsh). Congress enacted this exception to the FAA without apparent further comment.

30. Foster v. Turley, 808 F.2d 38, 40 (10th Cir. 1986); *accord*, Mesa Operating Ltd. Partnership v. Louisiana Intrastate Gas Corp., 797 F.2d 238, 243-44 (5th Cir. 1986). The Commerce Clause invests Congress with the power "[t]o

construction extends to the exception[31] and disagree over whether the exception requires employees to be actively engaged in interstate transportation.[32]

In *Tenney Engineering, Inc. v. United Electrical, Radio & Machine Workers*,[33] the Third Circuit adopted a narrow definition of "commerce" for purposes of the section 1 exclusion, even though it construed "commerce" broadly in defining the scope of the FAA's general coverage under section 2.[34] The court stated:

> We think that the intent of [including workers in interstate commerce] was, under the rule of ejusdem generis, to include only those other classes of workers who are likewise engaged directly in commerce, that is, only those other classes of workers who are actually engaged in the movement of interstate or foreign commerce or in work so closely related thereto as to be in practical effect part of it.[35]

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regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." U.S. CONST., art. I, § 8, cl. 3.

31. The only thorough discussions of the exclusion have come from the Court's dissenters. In *Gilmer*, Justice Stevens dissented from the Court's refusal to consider whether § 1 of the FAA excluded all employment contracts, noting that the majority "skirts the antecedent question of whether the coverage of the [FAA] even extends to arbitration clauses contained in employment contracts, regardless of the subject matter of the claim at issue." 111 S. Ct. at 1657 (Stevens, J., dissenting). The Court maintained that the lower courts did not entertain the issue, that Gilmer did not raise the issue in his petition for certiorari and, moreover, that the clause was not part of an employment contract per se but was instead an employment clause in a general contract with securities exchanges, not with his employer. *Id.* at 1651-2 n.2; *accord*, Textile Workers Union v. Lincoln Mills, 353 U.S. 448, 466-67 (1957) (Frankfurter, J., dissenting).

32. *See, e.g.*, Bacashihua v. United States Postal Serv., 859 F.2d 402, 404 (6th Cir. 1988).

33. 207 F.2d 450 (3d Cir. 1953) (en banc).

34. *Id.* at 453.

35. *Id.* at 452. The court examined the legislative history of the FAA, concluding that the drafters of the Act added the "workers engaged in . . . interstate commerce" phrase to appease the Seamen's Union, which argued that because admiralty law had jurisdiction over seamen's wages, maritime workers should not be subjected to arbitration agreements. *Id.* The court also identified congressional intent to exclude railway workers, whose disputes the Railway Labor Act, 45 U.S.C. §§ 151-169 (1988), controlled. *Id.* at 452 (quoting ABA REPORT, *supra* note 29, at 287). *But see* Archibald Cox, *Grievance Arbitration in the Federal Courts*, 67 HARV. L. REV. 591, 597-99 (1954) (remarking that the *Tenney Engineering* court's approach to defining "interstate commerce," "is clearly wrong").

Judge McLaughlin, joined by Judge Staley, delved further into the legislative history, and determined that "there can be *no* compulsory arbitration under this Act of collective bargaining agreements." *Tenney Eng'g*, 207 F.2d at 455-56 (McLaughlin, J., dissenting) (citing *FAA Hearings*, *supra* note 29, at 9; 65 CONG. REC. 984, 1931, 11,080 (1924)) (emphasis added). Judge McLaughlin contended that "[s]ince the intention of Congress manifestly was to confine

Three other circuits have adopted the *Tenney Engineering* restriction, endorsing its narrow definition of "commerce" for purposes of the section 1 exception.[36]

Several other circuits favor a broader definition of "commerce" that includes nearly all workers employed in an industry that Congress may regulate under the Commerce Clause.[37] For example, in *Willis v. Dean Witter Reynolds, Inc.*[38] the Sixth Circuit argued that Congress intended to extend both the FAA *"and its exclusions"* to the extent of its Commerce Clause powers.[39] The *Willis* court reasoned that a broad definition of "commerce" extends not only to the general language of section 2 but also to the *exclusionary* language of section 1.[40] Imposing

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the Act to commercial disputes, ejusdem generis has no possible relevancy here," and inferred that the majority's application of this principle was "in conflict with the general purpose of the statute." *Id.* at 458 (McLaughlin, J., dissenting) (citations omitted). Adhering to the antiquated definition of "interstate commerce" in 1925, he noted, distorts the scope of the exception for three reasons. First, Congress certainly possessed the power in 1925 (presumably under the Commerce Clause) to exclude all employment contracts from the FAA's provisions, not merely those in the direct channels of interstate commerce. *Id.* Second, even if Congress defined power under the Commerce Clause more narrowly in 1925 than in 1953, the narrow definition should not bind the court because "the law is not so inflexible." *Id.* at 459. Finally, the reenactment and codification of the Act as the FAA in 1947 suggests that the broader view of "commerce" in 1947 should apply. *Id.*

36. For example, the First Circuit held that a brokerage account executive does not engage in "interstate commerce" because other courts have limited § 1's exception to employees "involved in, or closely related to the actual movement of goods in interstate commerce." Dickstein v. duPont, 443 F.2d 783, 785 (1st Cir. 1971) (citing, e.g., *Tenney Eng'g*, 207 F.2d at 452-53). Similarly, the Second Circuit held that the exception does not cover a professional basketball player despite his obvious interstate movement. Erving v. Virginia Squires Basketball Club, 468 F.2d 1064, 1069 (2d Cir. 1972) ("Erving clearly is not involved in the transportation industry"); *see also* Miller Brewing Co. v. Brewery Workers Local Union No. 9, 739 F.2d 1159, 1162 (7th Cir. 1984) (limiting § 1's exclusion, without elaboration, to workers employed in transportation industries), *cert. denied*, 469 U.S. 1160 (1985).

37. Other circuits have not attempted to define the scope of the exception. *See, e.g.*, Alford v. Dean Witter Reynolds, Inc., 939 F.2d 229, 230 n.* (5th Cir. 1991) (admonishing courts to "be mindful of this potential [FAA] issue in future cases" but not addressing it); American Postal Workers Union v. United States Postal Serv., 823 F.2d 466, 473 & n.10 (11th Cir. 1987) (opting not to "choose sides" in the FAA debate); Local 1020, United Bhd. of Carpenters v. FMC Corp., 658 F.2d 1285, 1290 (9th Cir. 1981) (citing Textile Workers Union v. Lincoln Mills, 353 U.S. 448, 455 (1957) (Frankfurter, J., dissenting) (suggesting a preference for excluding all labor disputes from the FAA but recognizing the Court's reluctance to decide the issue)).

38. 948 F.2d 305 (6th Cir. 1991).

39. *Id.* at 310 (citing Southland Corp. v. Keating, 465 U.S. 1, 11-16 (1984) (emphasis added)).

40. *Id.* at 310-11 (citations omitted).

a narrower meaning on section 1's exclusions than on section 2's inclusions, it stated, "would be inconsistent."[41]

The court paid particular attention to the role of the civil rights movement in defining the scope of the FAA, reasoning that in cases arising under civil rights statutes, the scope of the section 1 exception should be coextensive with the scope of the Commerce Clause.[42] Because Title VII or Age Discrimination in Employment Act ("ADEA") claims require employer involvement in interstate commerce,[43] the court reasoned, employment contracts with such employers constitute "contracts of employment . . . [in] interstate commerce" excluded by section 1 of the FAA.[44]

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41. *Id.* at 311 (quoting United Elec., Radio, & Mach. Workers v. Miller Metal Prods., Inc., 215 F.2d 221, 224 (4th Cir. 1954)). Archibald Cox criticized the Third Circuit's reasoning in Tenney Engineering v. United Electrical, Radio & Machine Workers, 207 F.2d 450 (3d Cir. 1953), as inconsistent and "self-defeating." *See* Cox, *supra* note 35, at 599. Section 2 of the FAA would only apply to a collective bargaining grievance at all, he observed, if the collective bargaining agreement evidences a " 'transaction involving commerce.' " *Id.* at 598 (quoting 9 U.S.C. § 2 (1988)). If a § 2 plaintiff wishes to avoid the conclusion that the collective bargaining agreement falls within the § 1 exception, however, she must argue that the employee is not "involved" in commerce. Cox stated that "[this argument] demonstrates that the contract is that of a worker engaged in interstate commerce within the exception which prevents its enforcement," and concluded that the only way to avoid this logical conundrum would involve a narrow and technical meaning of the term "commerce." *Id.* at 599. "One should not rely on one policy in interpreting the phrases relating to commerce and an opposite conception in reading 'contract of employment,' " he admonished. *Id.* (footnote omitted).

42. *Willis*, 948 F.2d at 311. Congress premised the reach of federal antidiscrimination laws, beginning with the Civil Rights Act of 1964, on the Commerce Clause, U.S. CONST. art. I, § 8, cl. 3. *See* Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241, 249 (1964). Two important cases in 1964 defined modern Commerce Clause jurisprudence. The first, *Heart of Atlanta Motel*, involved a challenge by a Georgia hotel operator to the constitutionality of Title II of the Civil Rights Act of 1964, 42 U.S.C. § 2000a-2000a-6. *See* 379 U.S. at 242-43. The second, Katzenbach v. McClung, 379 U.S. 294 (1964), involved a challenge to the same statute by a restaurant with an almost wholly intrastate clientele. 379 U.S. at 296. In both cases, the Court upheld the constitutionality of Title II based on Congress's power to regulate interstate commerce. *Heart of Atlanta Motel*, 379 U.S. at 258; *McClung*, 379 U.S. at 301, 304. The state action problem under the Fourteenth and Fifteenth Amendments seems to provide the original impetus for expanding Commerce Clause powers. *Cf. Heart of Atlanta Motel*, 379 U.S. at 260 (noting the prior failure of due process and equal protection objections). Because Congress has power to reach private actors under the Commerce Clause, the Court viewed it as an ideal vehicle for reaching racial discrimination in private business concerns.

43. *Willis*, 948 F.2d at 311. The court supported this conclusion through an examination of the legislative history of the FAA. *Id.*

44. *Id.* The Fourth and Tenth Circuits reached the same result through a more cursory analysis. *See* United Food & Commercial Workers v. Safeway

C. ARBITRATION OF STATUTORY CLAIMS: THE PRECEDENTS

Even when the FAA does not authorize compulsory arbitration, a party may attempt to compel arbitration pursuant to the Labor-Management Relations Act[45] or under general contract principles. If the dispute arises under statute, the question becomes the substantive arbitrability of the dispute—that is, whether a statutory remedy for an action that also breaches a contract, and the injured individual's interest in enforcing such a statutory remedy, render arbitration inappropriate.

1. *Alexander v. Gardner-Denver Co.*

In *Alexander v. Gardner-Denver Co.*,[46] the Supreme Court held that an employer could not prevent an employee subject to a collective bargaining agreement that required compulsory arbitration of discrimination claims from bringing a Title VII lawsuit in federal court.[47] The Court first noted that because

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Stores, Inc., 889 F.2d 940, 943-44 (10th Cir. 1989) (FAA generally inapplicable to labor arbitration despite lack of showing that union members were involved in interstate commerce); United Elec., Radio & Mach. Workers v. Miller Metal Prods., Inc., 215 F.2d 221, 224 (4th Cir. 1954) (refusing to adopt the *Tenney Engineering* distinction between employees engaged in the production of goods for interstate commerce and employees engaged in transportation in interstate commerce because it found no reasons to impose such a narrow construction on the statutory language); Mercury Oil Refining Co. v. Oil Workers Int'l Union, 187 F.2d 980, 983 (10th Cir. 1951) (holding that § 1 specifically excludes labor contracts from the FAA); International Union v. Colonial Hardwood Flooring Co., 168 F.2d 33, 36 (4th Cir. 1948) ("[i]t is perfectly clear, we think, that it was the intention of Congress to exclude contracts of employment from the operation of [sections 2, 3 and 4 of the FAA]. Congress was steering clear of labor disputes.").

45. Labor-Management Relations Act, ch. 120, § 301(a), 61 Stat. 136, 156 (1947) (codified as amended at 29 U.S.C. § 185 (1988)). Section 301 of the Labor-Management Relations Act provides the basis for compulsory labor arbitration.

46. 415 U.S. 36 (1974).

47. *Id.* at 59-60. The last step of the bargaining agreement's grievance-arbitration procedure stressed that "the arbitrator's decision must be based solely upon an interpretation of the provisions of this Agreement." *Id.* at 40-41 n.3. Alexander testified at his arbitration hearing that he was discharged as a result of racial discrimination and that he had filed a complaint with the Colorado Civil Rights Commission (which referred the complaint to the EEOC) because he "could not rely on the union" to support his discrimination charge. *Id.* at 42.

Following arbitration, the EEOC issued Alexander a "right-to-sue" notice, 42 U.S.C. § 2000e-5(f)(1) (1988); 29 C.F.R. § 1601.28 (1992), and he brought suit in federal district court. 415 U.S. at 43. The district court granted Gardner-Denver's motion for summary judgment, holding the arbitration final and binding as Alexander had "voluntarily elected" to pursue arbitration. *Id.* (citing Alexander v. Gardner-Denver Co., 346 F. Supp. 1012 (D. Colo. 1971)). The

Congress enacted Title VII to eliminate employment discrimination based on suspect classifications[48] and because Title VII vests final enforcement powers solely in federal courts, not in the EEOC or the various state agencies empowered to settle disputes through "conference, conciliation, and persuasion,"[49] the judicial system remains ultimately responsible for enforcing Title VII rights.[50]

Second, the Court rejected the argument that an employee waives his Title VII cause of action by submitting his grievance to arbitration. The collective bargaining agreement, it noted, is a majoritarian instrument that does not necessarily represent the interests of minority groups and is thus inconsistent with Title VII, which "concerns not majoritarian processes, but an individual's right to equal employment opportunities."[51] Had Alexander and Gardner-Denver knowingly and voluntarily entered into a "settlement expressly conditioned on a waiver of [his] cause of action under Title VII," the Court commented, the waiver of rights in exchange for employer concessions might be appropriate.[52]

Tenth Circuit affirmed the lower court's dismissal in Gardner-Denver Co. v. Alexander, 466 F.2d 1209 (10th Cir. 1972) (per curiam).

48. *Gardner-Denver*, 415 U.S. at 44 (citing McDonnell Douglas Corp. v. Green, 411 U.S. 792, 800 (1973); Griggs v. Duke Power Co., 401 U.S. 424, 429-30 (1971)).

49. *Id.* The Court concluded that Title VII provisions "make plain that federal courts have been assigned plenary powers to secure compliance with Title VII." *Id.* at 45. "Legislative enactments in [the civil rights] area have long evinced a general intent to accord parallel or overlapping remedies against discrimination." *Id.* at 47. The Court also observed that Congress defeated amendments in 1964 and 1971 that would have made Title VII the exclusive federal remedy for all unlawful employment practices. *Id.* at 48 n.9 (citing 110 CONG. REC. 13,650-52 (1964) and H.R. REP. NO. 238, 92d Cong., 2d Sess. (1971)). The Court concluded that the legislative history of the Civil Rights Act of 1964 and its progeny strongly suggest that Title VII, not arbitration or other statutory remedies, is the final source of relief from discrimination. *Id.* at 48.

50. *Id.* at 45 ("[T]he private right of action remains an essential means of obtaining judicial enforcement of Title VII."). Conversely, the Court observed, the existence of a statutory right against discrimination does not displace an employee's contractual right to submit a grievance to arbitration because of "[t]he distinctly separate nature of these contractual and statutory rights." *Id.* at 50. An arbitrator must interpret and apply only the language of the contract to the grievance while a judge, on the other hand, interprets the laws. Thus, by instituting a Title VII action in federal court completely distinct from arbitration, the employee asserts a "statutory right independent of the arbitration process." *Id.* at 54.

51. *Id.* at 51.

52. *See id.* at 52 & n.15. The Court warned that because Title VII rights are individual rights of paramount societal importance whose "strictures are

Finally, the Court held that arbitrators lack authority to base their decisions on external law.[53] Because of this, the Court rejected the theory that federal courts should defer to arbitral decisions on statutory issues.[54] The Court expressed its concern over the inevitable deprivation of statutory rights that would result from deferral to the arbitral process,[55] observing

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absolute and represent a congressional command that each employee be free from discriminatory practices," prospective waiver of an employee's Title VII rights through collective bargaining defeats the "paramount congressional purpose behind Title VII." *Id.*; *see also* William B. Gould IV, *Judicial Review of Labor Arbitration Awards*, *in* LABOR ARBITRATION: A PRACTICAL GUIDE FOR ADVOCATES, *supra*, at 336, 339 (recognizing that "inasmuch as majority rule simply has not worked in a sufficiently satisfactory manner, Congress had to prohibit by law discrimination because of race, sex, religion, and national origin"); Robert G. Howlett, *Why Arbitrators Apply External Law*, in LABOR ARBITRATION: A PRACTICAL GUIDE FOR ADVOCATES 257, 268 & n.48 (Max Zimny et al. eds., 1990) (agreeing with Justice Brennan's statement in Barrentine v. Arkansas-Best Freight System, 450 U.S. 728 (1981), that "[t]he union's interests and those of the individual employee are not always identical or even compatible"). *See generally* Michele M. Hoyman & Lamont E. Stallworth, *Arbitrating Discrimination Grievances in the Wake of* Gardner-Denver, MONTHLY LAB. REV., Oct. 1983, at 3, 5 (empirical study illustrating the importance of judicial resolution as a countermajoritarian remedy, in part through a finding that 71.9% labor attorneys favored the *Gardner-Denver* decision even though only 28.2% of management attorneys did).

53. *Gardner-Denver*, 415 U.S. at 53. The Court pointed out that because the source of the arbitrator's authority is the bargaining agreement, the arbitrator must base her decision upon the contract language and the intent of the parties. *Id.*

54. *Id.* at 55-56. Gardner-Denver asserted three bases for judicial deference to arbitral decisions: first, when the parties presented the statutory claim to the arbitrator; second, when the bargaining agreement prohibited the discrimination charged in the Title VII suit; and third, "when the arbitrator has the authority to rule on the claim" and to provide a remedy. *Id.*

55. *Id.* at 55-59. The "deferral rule," noted the Court, "is necessarily premised on the assumption that arbitral processes are commensurate with judicial processes and that Congress impliedly intended federal courts to defer to arbitral decisions on Title VII issues." *Id.* at 56. The Court thought this assumption "unlikely." *Id.* Arbitration of statutorily protected employment rights, the Court explained, falls short of the judicial process in several ways. First, arbitrators are specially competent in "the law of the shop, not the law of the land." *Id.* at 57 (citing United Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574, 581-83 (1960)). Because of this, arbitrators are ill-suited to resolve statutory or constitutional questions. Second, the factfinding process in arbitration is not the same as judicial factfinding—for example, because the rules of evidence do not apply, the usual precautions of discovery, cross-examination and testimony under oath, inter alia, are limited or unavailable. *Id.* at 57-58 (citing Bernhardt v. Polygraphic Co., 350 U.S. 198, 203 (1956); Wilko v. Swan, 346 U.S. 427, 435-37 (1953)). Finally, and perhaps most importantly, " 'arbitrators have no obligation to the court to give their reasons for an award,' " making arbitration a casual and inexpensive process that, while an expeditious means of disposing of many disputes, is inappropriate for resolving

that employees might consequently avoid voluntary arbitration and paradoxically generate more litigation.[56]

2. *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*

Ten years later, in *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*,[57] the Court found that *Gardner-Denver*'s reasoning did not apply to commercial disputes.[58] In *Mitsubishi*, the Court compelled the arbitration of an antitrust claim under an international sales agreement based on the trend toward compulsory arbitration of statutory disputes.[59] Nonetheless, it observed that either express congressional intent to preclude waiver of an employee's statutory right to a judicial proceeding,[60] or a fundamental inconsistency between statutory goals and arbitration would render arbitration of a statutory dispute inappropriate.[61] Applying this two-part test for substantive arbitrability of statutory claims to the Sherman Act, the Court concluded that the statutory language, its legislative history, and the purposes underlying the Sherman Act

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the important public policy concerns behind Title VII's statutory mandate. *Id.* at 58 & n.19 (quoting United Steelworkers v. Enterprise Wheel & Car Corp., 363 U.S. 593, 598 (1960)); *cf.* HOWARD R. SACKS & LEWIS S. KURLANTZICK, MISSING WITNESSES, MISSING TESTIMONY, & MISSING THEORIES: HOW MUCH INITIATIVE BY LABOR ARBITRATORS? 123-24 (1988) (opining that when the parties to arbitration cannot agree on whether the arbitrator should be allowed to decide questions of "external law" for which the contract does not explicitly provide, the arbitrator should decline to decide the questions and preserve for the complaining party its "veto over [arbitral] initiative").

56. *Gardner-Denver*, 415 U.S. at 59.

57. 473 U.S. 614 (1985).

58. *Id.* at 625. The *Mitsubishi* dispute arose under the Sherman Act, 15 U.S.C. §§ 1-11 (1988). *Mitsubishi*, 473 U.S. at 619.

59. The *Mitsubishi* Court reasoned that "we are well past the time when judicial suspicion of the desirability of arbitration and of the competence of arbitral tribunals inhibited the development of arbitration as an alternative means of dispute resolution." *Id.* at 626-27.

60. *Id.* at 627-28 (citing Wilko v. Swan, 346 U.S 427, 434-35 (1953)).

61. *Id.* at 632-37. The *Mitsubishi* Court explained that "the Court of Appeals correctly conducted a two-step inquiry, first determining whether the parties' agreement to arbitrate reached the statutory issues, and then, upon finding that it did, considering whether legal constraints external to the parties' agreement foreclosed the arbitration of those claims." *Id.* at 628. Later decisions further develop the *Mitsubishi* two-part test. *See* Shearson/American Express, Inc. v. McMahon, 482 U.S. 220, 227 (1987) (stating *Mitsubishi*'s two-part test for substantive arbitrability of statutory claims: "If Congress did intend to limit or prohibit waiver of a judicial forum for a particular claim, such an intent 'will be deducible from [the statute's] text or legislative history' or from an inherent conflict between arbitration and the statute's underlying purposes." (quoting *Mitsubishi*, 473 U.S. at 632-37 (internal citation omitted)).

did not render antitrust claims substantively nonarbitrable.[62]

Despite *Mitsubishi*'s recognition that not all statutory claims are substantively arbitrable, courts began applying *Mitsubishi* and other commercial arbitration cases[63] to narrow *Gardner-Denver*'s application to employment discrimination cases. This progressive narrowing culminated in the Supreme Court's 1991 employment discrimination decision, *Gilmer v. Interstate/Johnson Lane Corp.*[64]

3. *Gilmer v. Interstate/Johnson Lane Corp.*

In *Gilmer v. Interstate/Johnson Lane Corp.*,[65] the latest Supreme Court case to consider compulsory arbitration, the Court addressed whether an employer can compel arbitration of an ADEA claim.[66] At the outset, the Court emphasized that it expressed no opinion about the scope of the exception in section 1 of the FAA.[67] Instead, it applied the FAA, distinguishing the arbitration clause in *Gilmer* as part of a commercial contract, not part of a collective bargaining agreement.[68] The Court then turned to Mitsubishi's two-part test.[69] It found no evidence that Congress intended such preclusion of arbitration

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62. 473 U.S. at 629-36 (citations omitted).

63. *E.g.*, Rodriguez de Quijas v. Shearson/American Express, Inc., 490 U.S. 477 (1989) (upholding enforceability of an agreement to arbitrate commercial claims under several sections of the Securities Exchange Act of 1934); Shearson/American Express, Inc. v. McMahon, 482 U.S. 220 (1987) (same).

64. 111 S. Ct. 1647 (1991).

65. *Id.*

66. *Id.* at 1650. The plaintiff in *Gilmer* was a 62 year-old securities representative who claimed that he lost his job as a result of age discrimination. *Id.* at 1651. His registration with various stock exchanges, as required for employment, provided that he would agree to arbitrate any disputes—in particular, any controversy arising out of his employment or termination—between himself and his employer. *Id.* at 1650-51.

Gilmer brought an ADEA suit in federal court after his termination. His employer responded with a motion to compel arbitration of the ADEA claim pursuant to the arbitration agreement in the registration and the FAA. *Id.* at 1651. The district court denied the motion by extending *Gardner-Denver*'s reasoning to ADEA claimants. *Id.* In reversing the lower court's decision, the Fourth Circuit found " 'nothing in the text, legislative history, or underlying purposes of the ADEA indicating a congressional intent to preclude enforcement of arbitration agreements.' " *Id.* (quoting Gilmer v. Interstate/Johnson Lane Corp., 895 F.2d 195, 197 (4th Cir. 1990)).

67. *Gilmer*, 111 S. Ct. at 1651 n.2.

68. *Id.*; *see supra* notes 27 & 31 for Justice Stevens' dissent, urging the Court to address the scope of the § 1 exception and to more carefully consider whether labor and employment disputes are ever arbitrable under the FAA.

69. *Gilmer*, 111 S. Ct. at 1652.

either through the text or legislative history of the ADEA.[70] Likewise, it found no inconsistency between compulsory arbitration and the goals of the ADEA, unlike Title VII in *Alexander v. Gardner-Denver Co.*[71] Ultimately finding that Gilmer had not met his burden,[72] the Court held that the ADEA does not preclude enforcement of the arbitration clause under the FAA.[73]

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70. *Id.* Gilmer conceded that neither the text or legislative history of the ADEA explicitly precludes arbitration. *Id.*

71. *Id.* at 1653-54. The Court, distinguishing *Gardner-Denver*, explained that *Gardner-Denver* concerned "the issue whether arbitration of contract-based claims precluded subsequent judicial resolution of statutory claims," where *Gilmer* concerned arbitration of statutory claims embodied in a contract. *Id.* at 1657. Further, it observed that *Gardner-Denver* addressed the question of whether a collective-bargaining agreement provided adequate protection to individual rights, a tension not present in *Gilmer*, where the employee had signed an individual employment contract. *Id. See* Thomas H. Stewart, Comment, *Arbitrating Claims Under the Age Discrimination in Employment Act of 1967:* Gilmer v. Interstate/Johnson Lane Corp., 59 U. CIN. L. REV. 1415, 1436-37 (1991) (asserting that courts should bind employees to arbitration agreements and accepting idea that because unions are "one of the traditional sources of discrimination," individual employment agreements do not present the problem the Court addressed in *Gardner-Denver*). *Contra* Utley v. Goldman Sachs & Co., 883 F.2d 184, 187 (1st Cir. 1989) (holding that "an employee cannot waive prospectively her right to a judicial forum at any time, regardless of the type of employment agreement which she signs"), *cert. denied*, 493 U.S. 1045 (1990); *see also* Dowd, *supra* note 27, at 445 (stating that "it is clearly against the congressional objectives of the [ADEA] to permit an employer practicing age discrimination to contract away an elderly employee's right to waive arbitration"); Note, *Agreements to Arbitrate Claims Under the Age Discrimination in Employment Act*, 104 HARV. L. REV. 568, 575 (1990) (agreeing that allowing an employee to contract away the right to a judicial resolution under the ADEA might "undermine the ADEA's function of protecting employees from abuse arising from the disparity in bargaining power in the employment relationship") (citing Nicholson v. CPC Int'l, Inc., 877 F.2d 221, 229 (3d Cir. 1989)).

Gilmer devoted considerable discussion to the ability of commercial arbitration to mimic a judicial forum. *See* 111 S. Ct. at 1652-57. Rejecting the *Gardner-Denver* arguments that arbitration lacked the qualities of federal courts that are essential to resolving serious questions of statutory law, the Court argued that the competence of arbitrators had improved to the point that the " 'mistrust of the arbitral process' " expressed in *Gardner-Denver* was no longer wholly valid. *Id.* at 1656 n.5 (quoting Shearson/American Express Inc. v. McMahon, 482 U.S. 220, 231 (1987)); *cf.* Nicholson v. CPC Int'l, Inc., 877 F.2d 221, 229 (3d Cir. 1989) ("We do not base our conclusion [denying arbitration on policy grounds in ADEA cases] on any disparagement of the competence or sophistication of modern arbitrators.").

72. *Gilmer*, 111 S. Ct. at 1652 (citing Shearson/American Express Inc. v. McMahon, 482 U.S. 220, 227 (1987) for the proposition that the party wishing to avoid contractual arbitration bears the burden of demonstrating congressional intent).

73. *Id.* at 1657.

Several courts have extended *Gilmer*'s holding to compel arbitration of Title VII claims under commercial contracts. For example, the Eleventh Circuit[74] compelled arbitration of a plaintiff's Title VII claim who signed the same securities agreement as the plaintiff in *Gilmer*.[75] Likewise, the Ninth Circuit[76] relied on *Gilmer* to reject *Gardner-Denver*'s applicability to commercial contracts.[77]

Other circuits, however, maintain the pre-*Gilmer* position that Title VII disputes are not substantively arbitrable. For example, in *Swenson v. Management Recruiters International*,[78] an employment contract case, the Eighth Circuit concluded that although *Gardner-Denver* involved a collective bargaining agreement and not an employment contract, its reasoning applies to employment contracts because of the "unique nature" of Title VII, not the type of contact involved.[79] The court rejected arguments that the federal policy favoring arbitration should control, noting that in Title VII cases, *Gardner-Denver*'s reasoning strongly suggests that Congress did not intend otherwise valid arbitration clauses to preempt federal judicial remedies.[80] The court recognized that *Mitsubishi*[81] concerned commercial arbitration in the antitrust context, not civil rights

74. Bender v. A.G. Edwards & Sons, Inc., 971 F.2d 698 (11th Cir. 1992).

75. *Id.* at 700. The court distinguished *Gardner-Denver* as a collective bargaining case; in *Bender*, the plaintiff's "statutory rights were not compromised to secure the interests of other employees in a bargaining unit" as they were in *Gardner-Denver*. *Id.* It also found "no reason to distinguish between ADEA claims and Title VII claims." *Id.*

76. Mago v. Shearson Lehman Hutton, Inc., 956 F.2d 932 (9th Cir. 1991).

77. *Id.* at 935. The court then concluded that no substantive policy differences between the ADEA and Title VII sufficiently distinguished *Gardner-Denver* from *Gilmer* in the arbitral context. The Ninth Circuit felt that "both statutes are similar in their aims and substantive provisions." *Id.*

The Fifth and Sixth Circuits have also found Title VII disputes arbitrable under *Gilmer*. In Willis v. Dean Witter Reynolds, Inc., 948 F.2d 305 (6th Cir. 1991), the Sixth Circuit, despite concluding that the interstate commerce exception in § 1 of the FAA extends to all workers covered by Title VII, nonetheless decided that the type of contract containing the arbitration clause, not the substantive law in question, governed the arbitrability of the dispute. *Id.* at 311-12; *see supra* notes 38-44 and accompanying text. Similarly, in Alford v. Dean Witter Reynolds, Inc., 939 F.2d 229 (5th Cir. 1991), *aff'd*, 975 F.2d. 1161 (5th Cir. 1992), the Fifth Circuit directly applied *Gilmer* in holding that *Gardner-Denver*'s reasoning did not control this Title VII case which, incidentally, involved the same securities registration as that in *Gilmer*. *Id.* at 230 (quoting Alford v. Dean Witter Reynolds, Inc., 905 F.2d 104, 107 (5th Cir. 1990)).

78. 858 F.2d 1304 (8th Cir. 1988), *cert. denied*, 493 U.S. 848 (1989).

79. *Id.* at 1306.

80. *Id.*

81. 473 U.S. 614 (1985).

in the employment setting.[82] Further, it explained that *Mitsubishi* pronounced congressional intent a better test of arbitrability than the adequacy of the forum,[83] and concluded that when Congress passed Title VII, it found arbitration ill-suited to realize the "transcendent public interest" in enforcing Title VII.[84]

II. ARBITRATION OF ADA CLAIMS

In *Alexander v. Gardner-Denver Co.*,[85] the Court concluded that an employee's arbitration of his discrimination claim pursuant to a collective bargaining agreement did not preclude him from later bringing a Title VII claim in federal court.[86] In *Gilmer v. Interstate/Johnson Lane Corp.*,[87] however, the Court held that *Gardner-Denver* does not control the substantive arbitrability of an ADEA claim involving a commercial agreement.[88] At first glance, *Gilmer* appears to seriously impair *Gardner-Denver*'s applicability to ADA disputes. *Gilmer* involved an employment dispute and a federal antidiscrimination

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82. *Swenson*, 858 F.2d at 1306 & n.5.

83. *Id.* at 1307; *see supra* text accompanying note 60.

84. *Swenson*, 858 F.2d at 1307. The First Circuit also has not altered its holding that compulsory arbitration of Title VII cases is inappropriate. Utley v. Goldman Sachs & Co., 883 F.2d 184 (1st Cir. 1989), *cert. denied*, 493 U.S. 1045 (1990). For Title VII claims, the *Utley* Court explained,

> [t]he fact that [claimant] signed an individual employment agreement . . . is not significant. . . . [because] a requirement for employees to participate in arbitration prior to initiating claims in a judicial forum is inconsistent with the Congressional intent behind Title VII. As Congress has made the policy against discrimination "a highest priority," we rule that an employee cannot waive prospectively her right to a judicial forum at any time, regardless of the type of employment agreement which she signs.

Id. at 187 (citation omitted). The First Circuit relied upon "Title VII's unique nature" and policy against discrimination in concluding that prospective waiver of the right to a judicial forum under Title VII is always invalid. *Id.* at 187; *see also* Nicholson v. CPC Int'l, Inc., 877 F.2d 221 (3d Cir. 1989) (holding that *Gardner-Denver*'s reasoning fully applied to ADEA cases).

Other circuits have followed the *Swenson* rule in the context of other statutes. *See, e.g.*, Sutton v. Cleveland Bd. of Educ., 958 F.2d 1339 (6th Cir. 1992) (42 U.S.C. § 1983); EEOC v. Board of Governors of State Colleges and Univs., 957 F.2d 424, 431 n.11 (7th Cir.) (ADEA) (*Gilmer* "expressly distinguished cases occurring 'in the context of collective bargaining agreements' "), *cert. denied*, 113 S. Ct. 299 (1992); Bolden v. Southeastern Pa. Transp. Auth., 953 F.2d 807 (3d Cir. 1991) (42 U.S.C. § 1983), *cert. denied*, 112 S. Ct. 2281 (1992); Johnson v. Palma, 931 F.2d 203 (2d Cir. 1991) (Title VII).

85. 415 U.S. 36 (1974).

86. *Id.* at 51-52.

87. 111 S. Ct. 1647 (1991).

88. *Id.* at 1656-57.

statute, as did *Gardner-Denver*. Gilmer's employer sought to compel arbitration, as did Alexander's employer in *Gardner-Denver*. Moreover, *Gilmer* and *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*[89] seem to signify that the presumption of arbitrability, at least in the commercial context, is strong indeed.

The outward similarities between the two cases, however, do not spell the demise of *Gardner-Denver* as applied to ADA cases. This Part argues that *Gilmer* notwithstanding, labor and employment contract disputes arising under the ADA are not substantively arbitrable. Part II.A. explains that because *Gilmer*'s significance is limited to its holding that a statutory claim may be subject to compulsory arbitration under a commercial arbitration agreement, *Gilmer* has no application to collective bargaining agreements or employment contracts. Part II.B. argues that the legislative intent and public policies behind the ADA, as well as the policies favoring judicial resolution of public rights disputes in general, render compulsory binding arbitration inappropriate for resolving ADA disputes.

A. THE FAA: "WHERE AUTHORIZED BY LAW"?

1. For Commercial Contracts Only

In *Gilmer*, the Court found arbitration proper under section 2 of the FAA because the arbitration clause in question constituted part of a commercial contract, not a "contract of employment."[90] The Court reached this conclusion by noting that Gilmer's securities registration with the securities exchanges—a commercial contract—not his employment contract with Interstate, contained the arbitration clause.[91] Subsequent circuit court decisions involving the same securities registration espouse this distinction between commercial and employment agreements, even though the cases involve Title VII, not the ADEA.[92] *Gilmer*'s primary significance thus lies not in the substantive arbitrability of ADEA claims but in the arbitrability, under the FAA, of employment discrimination claims

89. 473 U.S. 614 (1985).

90. *Gilmer*, 111 S. Ct. at 1651 n.2. Because Gilmer did not raise the issue, the Court declined to interpret the meaning of "contracts of employment" under § 1 of the FAA. *Id.*

91. *Id.*

92. *See supra* notes 74-77 and accompanying text. *But see supra* notes 78-84 and accompanying text.

arising under commercial agreement.[93]

The *Gilmer* decision was not necessarily inconsistent with *Gardner-Denver*,[94] because it involved a commercial contract. Its narrow holding, however, must not extend to employment discrimination disputes arising under labor and employment contracts. The inequalities in bargaining power not present between Gilmer and Interstate[95] certainly exist in the case of collective bargaining agreements and employment contracts. This strongly suggests that compulsory arbitration is unsuited to resolving employment disputes arising under those types of contracts.

Collective bargaining agreements involve inherent conflicts between group goals and individual rights that arbitration cannot successfully resolve. As the Court recognized in *Gardner-Denver*, the collective bargaining process is a majoritarian process that cannot adequately promote the interests of minority groups.[96] That collective bargaining agreements do result from labor-management negotiation and are accordingly "representative" in some sense[97] does not aid the worker wishing to enforce a statutorily protected right against discrimination.[98]

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93. All of the cases discussed *supra* notes 74-77 and accompanying text involved the same securities registration as in *Gilmer*.

94. *Contra Gilmer*, 111 S. Ct. at 1657 (Stevens, J., dissenting); *cf.* Utley v. Goldman Sachs & Co., 883 F.2d 184 (1st Cir. 1989) (arguing that the substantive non-arbitrability of Title VII disputes precludes enforcement of an exclusive and compulsory arbitration clause regardless of its origin), *cert. denied*, 493 U.S. 1045 (1990); Swenson v. Management Recruiters Int'l, Inc., 858 F.2d 1304 (8th Cir. 1988) (same), *cert. denied*, 493 U.S. 858 (1989). Arguably, these cases correctly note that "contracts of employment" is a broad term subsuming all statute-based employment discrimination claims, not merely traditional employment contracts and collective bargaining agreements. Despite this, because *Gilmer* concludes that an employment arbitration provision that forms only part of a larger commercial contract with someone other than the employer is subject to the FAA, and because *Gilmer* limits its holding to that type of contract, see *infra* notes 106-08 and accompanying text, *Gilmer* does not, in practical effect, threaten employment discrimination suits as much it at first appears.

95. *See infra* notes 108-09 and accompanying text.

96. *Gardner-Denver*, 415 U.S. at 51; *accord*, Barrentine v. Arkansas-Best Freight Sys., 450 U.S. 728, 745-46 (1981) (union and individual interests are not necessarily compatible); *see also* Hoyman & Stallworth, *supra* note 52, at 4-5 (opinion poll showing that management and labor attorneys perceive the interest in enforcing rights under Title VII differently).

97. *See supra* text accompanying note 51.

98. Dilution of individual rights may occur even though unions owe a duty of fair representation to their employees. ELKOURI & ELKOURI, *supra* note 1, at 177-80 & nn.107-17. According to Elkouri & Elkouri, because arbitration remedies devised by the union " 'may well prove unsatisfactory or unworkable

Arbitration as part of a majoritarian collective bargaining agreement cannot substitute for the judicial resolution of conflicts with regard to protecting statutory individual rights.[99] Even *Gilmer* recognized the inadequacy of the majoritarian process, as it expressly distinguished *Gardner-Denver* as a collective bargaining case.[100]

Even more unsatisfactory than collective bargaining agreements for protecting the individual from discrimination, however, are individual employment contracts—non-negotiated instruments that force the employee to accept all or none of their terms.[101] Such contracts additionally involve the problem of unequal bargaining power.[102] The public interest in providing judicial enforcement of ADA and other statutory employment discrimination claims[103] is as compelling for individual employment contracts as for collective bargaining agreements. The *Gardner-Denver* Court stressed that private pursuit of Title VII claims remains essential to its judicial enforcement.[104] Because Title VII provides "minimum substantive guarantees to individual workers," the fact that a Title VII dispute arises from an individual employment agreement instead of a collective bargaining agreement is unimportant.[105]

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for the individual grievant,' " a grievant may seek judicial enforcement of contractual rights if the union has wrongly or arbitrarily refused to enforce those rights. *Id.* at 177-78 (quoting Vaca v. Sipes, 386 U.S. 171, 185 (1967)).

99. The ADA, like other employment discrimination statutes such as Title VII and the ADEA, is premised on the notion that certain protected groups of workers—the "discrete, insular minority" of disabled workers in the case of the ADA—are underrepresented and thus merit a higher level of protection than common legislative and other decision-making processes can afford them. *See* Gould, *supra* note 52, at 339 (noting that the antidiscrimination laws were promulgated in a response to unsatisfactory majoritarian rule); text accompanying note 51.

100. *Gilmer*, 111 S. Ct. at 1657.

101. *See* Nicholson v. CPC Int'l, Inc., 877 F.2d 221, 229 (3d Cir. 1989); *FAA Hearings*, *supra* note 29, at 9 (statement of Sen. Walsh).

102. *But see* Stewart, supra note 71, at 1432 n.148 (criticizing attempts to characterize employment agreements containing arbitration clauses as adhesion contracts and asserting that courts may review the validity of a given arbitration agreement without determining the substantive appropriateness of arbitration).

103. *See infra* notes 152-64 and accompanying text.

104. 415 U.S. at 45.

105. Swenson v. Management Recruiters Int'l, Inc., 858 F.2d 1304, 1306 (8th Cir. 1988), *cert. denied*, 493 U.S. 848 (1989); *see also* Alexander v. Gardner-Denver Co., 415 U.S. 36, 52 n.15 (reasoning that the peculiarly individual interest in Title VII permits an *individual* employee to "enter into a voluntary settlement expressly conditioned on a waiver of petitioner's cause of action under Title VII").

In contrast, the *Gilmer* Court's characterization of the contract as not a "contract of employment" but a commercial agreement was crucial to its holding that the FAA was applicable.[106] On its own, of course, this determination cannot legitimize the inclusion of employment arbitration clauses in commercial arbitration contracts. If an employer could avoid judicial resolution of employment discrimination disputes simply by incorporating an arbitration clause into a commercial contract to which it and the employee were parties, then commercial contracts would provide a convenient ruse for the shrewd employer.[107] The contract in *Gilmer*, however, bound the employee and a *third party*—the securities exchange.[108] Thus, although the securities exchanges may have unfairly included an adhesion clause in the securities registration,[109] the commercial agreement did not involve the same problems of unequal bargaining power between the employer and the employee that plague collective bargaining agreements and employment contracts.

2. The Breadth of the Section 1 Exception

To hold employment disputes arising under collective bargaining contracts and employment contracts exempt from compulsory arbitration under the FAA because of inequalities in bargaining power and inadequate representation, while limiting this holding to employment contracts and collective bargaining agreements for transportation industry workers under the "interstate commerce" language of section 1 seems absurd.[110] Yet, the *Tenney Engineering, Inc. v. United Electrical, Radio & Machine Workers*[111] line of cases demands precisely this result.[112]

Tenney Engineering and its progeny rely on the principle of ejusdem generis[113] to limit the "interstate commerce" excep-

106. Gilmer v. Interstate/Johnson Lane Corp., 111 S. Ct. 1647, 1651 n.2 (1991).

107. *See id.* at 1659 (Stevens, J., dissenting).

108. *Id.* at 1651 n.2.

109. *See id.* at 1659 (Stevens, J., dissenting) (noting that the employer required the employee to enter into a commercial agreement over which the employee had no influence).

110. *See* Cox, *supra* note 35, at 599 (remarking that "interstate commerce" should not mean two different things within the same statute).

111. 207 F.2d 450 (3d Cir. 1953) (en banc).

112. *See supra* notes 33-36 and accompanying text.

113. "Ejusdem generis" is defined as meaning:

Of the same kind, class or nature. In the construction of laws, wills

tion to workers directly involved in the transportation industries.[114] The reasoning behind *Tenney Engineering*, however, is wrong.[115] The FAA specifically exempts contracts of employment for workers in "*interstate commerce*" because Congress can regulate only interstate commerce pursuant to its Commerce Clause powers,[116] not because it intended to exempt only transportation workers and not because exempting only transportation workers makes any sense.[117] Further, the "interstate commerce" exception deserves broad interpretation to remain consistent with the definition of "interstate commerce" in the employment discrimination statutes of recent decades.

The *Tenney Engineering* court reasoned that the language in section 1 mentioning "seamen" and "railroad workers" restricts "workers engaged in . . . interstate commerce" to workers employed in the transportation industries.[118] Legislative history, however, only demonstrates that Congress added the "seamen" language in response to the Seamen's Union argument that admiralty law controlled their labor disputes,[119] and that it further added the "railroad workers" language to avoid conflict with the Railway Labor Act.[120] Nothing suggests that these specific concessions to organized labor impose a transportation industry limitation on the "workers engaged in . . . interstate commerce" language. In contrast, the legislative history distinctly warns that "[i]t is not intended that this shall be an

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and other instruments, the "ejusdem generis rule" is, that where general words follow an enumeration of persons or things, by words of a particular and specific meaning, such general words are to be held as applying only to persons or things of the same general kind or class as those specifically mentioned.

BLACK'S LAW DICTIONARY 279 (5th ed. 1983).

114. 207 F.2d at 452-53.

115. *See* Cox, *supra* note 35, at 598-99 (arguing that the courts should make up their minds and accept one definition of "interstate commerce" for the sake of consistency).

116. That is, Congress may not regulate anything *but* interstate commerce under the Commerce Clause; this power, however, is quite extensive. *See supra* note 42 and accompanying text.

117. *See infra* notes 118-21 and accompanying text.

118. *Tenney Eng'g*, 207 F.2d at 452-53 (stating that "[t]he draftsmen had in mind the two groups of transportation workers as to which special arbitration legislation existed and they rounded out the exclusionary clause by excluding all other similar classes of workers").

119. *See id.* at 455-59 (McLaughlin, J., dissenting); *see also* ABA REPORT, *supra* note 29, at 287 (expressing Seamen's Union concern over effect of FAA on admiralty jurisdiction).

120. *Tenney Eng'g*, 207 F.2d at 452-53.

act referring to labor disputes, at all."[121] Congress had ample opportunity to clarify this exception during the FAA's codification in 1947 if it truly felt that the exception should apply only to transportation industries.[122] Congress has never, however, altered the terms of the exception.[123] Thus, reading a transportation industry limitation into section 1 of the FAA is nonsensical because arbitration does not peculiarly disadvantage transportation industry workers in ways in which it does not disadvantage other employees. If transportation workers faced unique disadvantages through arbitration, Congress would have mentioned the special problems of transportation workers in text or legislative history, rather than discussing in a general sense the inapplicability of the FAA to labor and employment disputes.[124]

More importantly, the integral role of the Commerce Clause[125] in creating the comprehensive statutory scheme of antidiscrimination laws logically places all employees of employers covered by statutes such as the ADA under the section 1 exception, because employees by definition must be involved somehow in interstate commerce.[126] Congress explicitly states that it enacted the ADA pursuant to its Commerce Clause power.[127] Accordingly, as the Sixth Circuit observed in *Willis v. Dean Witter Reynolds, Inc.*,[128] the employer subject to an antidiscrimination law enacted pursuant to the Commerce Clause is engaged in "interstate commerce"—if not, Congress would

121. *FAA Hearings*, *supra* note 29, at 9.

122. *Tenney Eng'g*, 207 F.2d at 458-59 (McLaughlin, J., dissenting).

123. *Compare* Act of February 12, 1925, ch. 213, § 1, 43 Stat. 883 *with* 9 U.S.C. § 1 (1988) (identical language in both versions of § 1).

124. *See FAA Hearings*, *supra* note 29, at 9 (statements of Sen. Walsh and Mr. Piatt explaining that the FAA does not apply to labor and employment disputes).

125. U.S. CONST., art. I, § 8, cl. 3.

126. For example, it is now clear that a hotel may engage in interstate commerce because it is located off an interstate freeway or, even if it is more local in nature, because it operates a restaurant and orders most of its food from companies in other states. *See, e.g.*, Katzenbach v. McClung, 379 U.S. 297 (1964) (about half of food supplies of restaurant had moved in interstate commerce, even though the restaurant engaged in primarily intrastate business); Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241 (1964) (motel attracted patrons from other states); *see also supra* note 42 (discussing cases).

127. 42 U.S.C. § 12101(b)(4) (Supp. III 1991). Congress also invoked the Fourteenth Amendment as a basis for enacting the ADA. *Id.*

128. 948 F.2d 305 (6th Cir. 1991). Because the definitions of an "employer" for Title VII and ADA purposes are virtually identical, *Willis*'s reasoning applies to the ADA. *See supra* note 13.

lack constitutional authority to regulate its business.[129] Employees of this employer, therefore, are engaged in "interstate commerce" regardless of whether their job duties are directly entwined with interstate activity.[130]

Furthermore, the legislative history does not support the view that the "interstate commerce" exception applies only to transportation industry workers. Congress's broad regulatory powers under the Commerce Clause render the argument even more dubious. Instead, a proper interpretation of section 1 exempts from compulsory arbitration all collective bargaining agreements and employment contracts for workers subject to the ADA or other antidiscrimination laws promulgated pursuant to the Commerce Clause, reserving the FAA for commercial arbitration.[131]

B. ARBITRATION: "WHERE APPROPRIATE?"

The Supreme Court's decisions in *Gilmer*[132] and *Mitsubishi*[133] exhibit a growing preference for arbitration under the FAA.[134] Even in the noncommercial context,[135] the Court has

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129. *Id.* at 311.

130. *Id.*

131. Under § 2 of the FAA, of course, the commercial contract must evidence a "transaction involving commerce," to which the broad definition of "commerce" would presumably apply. *See supra* notes 37-44 and accompanying text.

132. 111 S. Ct. 1647 (1991).

133. 473 U.S. 614 (1985).

134. Both *Gilmer* and *Mitsubishi* invoke the " 'liberal federal policy favoring arbitration agreements.' " *Gilmer*, 111 S. Ct. at 1657 (quoting *Mitsubishi*, 473 U.S. at 625). *Gilmer* is somewhat troublesome because it is really an employment dispute in commercial clothing. *See supra* notes 106-09 accompanying text. Furthermore, as an ADEA case since extended in like circumstances to Title VII, see *supra* notes 74-77 and accompanying text, its reasoning may easily be transferred to true employment contract cases, emasculating *Gardner-Denver* and leaving the resolution of statutory claims to arbitrators. Commentators vigorously debated the wisdom of the *Gilmer* decision even while the case was still pending in the court of appeals. *See* Donohue & Siegelman, *supra* note 18; Dowd, *supra* note 27; Lobenthal, *supra* note 10; Stewart, *supra* note 71; Note, *supra* note 71. Because this Note argues that *Gilmer* premised its analysis on the commercial nature of the agreement, rather than focusing on the nature of the statute involved, it will not address the correctness of *Gilmer*'s substantive arbitrability analysis under *Mitsubishi*, even though this author believes that the analysis is flawed.

135. Most attempts to compel arbitration of collective bargaining agreements arise under § 301 of the Labor-Management Relations Act of 1947. In Textile Workers Union v. Lincoln Mills, 353 U.S. 448 (1957), the court interpreted § 301 to authorize federal and state courts to compel specific performance of an arbitration clause in a collective bargaining agreement. Under the

long expressed a preference for arbitration when appropriate,[136] because of its ability to resolve contractual disputes on an individualized basis in an efficient, inexpensive, and private manner.[137] Many of its advantages over the judicial process, however, render it inappropriate as a binding method of resolving discrimination claims.[138] Arbitral decisions have no obligatory precedential value, even for subsequent arbitral proceedings.[139] The arbitrator may only publish them with the consent of the parties. Arbitral decisions thus form no coherent body of law and provide few guidelines for future behavior.[140] Further, although arbitrators may consider statutory law in arriving at awards,[141] courts may not reverse their decisions for errors in interpreting or applying law.[142]

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narrow *Tenney Engineering* interpretation of the FAA, a party to an employment contract may seek arbitration under the FAA, but the party more likely will seek arbitration pursuant to the contract terms themselves. *See supra* notes 35-36 and accompanying text.

136. *Lincoln Mills*, 353 U.S. at 455.

137. *See, e.g., Gilmer*, 111 S. Ct. at 1655 (characterizing commercial arbitration as an informal method of out-of-court dispute resolution); ELKOURI & ELKOURI, *supra* note 1, at 7-9 (labor arbitrators need not rely on previous published arbitration decisions, so each award is specific to the facts of the case); FAIRWEATHER'S ARBITRATION, *supra* note 1, at 526-30 (outlining benefits of arbitration, including cost and propensity for more conciliatory settlements); Dowd, *supra* note 27, at 444 (arbitration has cost advantages over litigation and ideally "results in less tension and hostility" between parties).

138. Alexander v. Gardner-Denver Co., 415 U.S. 36, 56-58 (1974) (observing that arbitration is suitable for resolving some disputes because of arbitrators' special competence in the "law of the shop" and the informal atmosphere of arbitral proceedings, but that these factors render arbitration "comparatively inferior" to the judicial process with regard to Title VII); *see also* FAIRWEATHER'S ARBITRATION, *supra* note 1, at 525-26 (parties should assume that agreements in employment contracts to arbitrate "all disputes" do not include federally protected statutory claims).

139. *See* ELKOURI & ELKOURI, *supra* note 1, at 421 ("prior labor arbitration awards are not binding in exactly the same sense that authoritative legal decisions are").

140. *Id.* at 417 (noting that the Code of Professional Responsibility requires confidentiality of arbitral award except at incentive of parties).

141. *See id.* at 100 & n.1 (4th ed. Supp. 1989) (citing various cases and labor arbitration decisions in which the arbitrator relied upon external law); *see also* FAIRWEATHER'S ARBITRATION, *supra* note 1, at 525 & n.58 (arbitral decision of statutory claim may be accorded "great weight" in some courts, even if it lacks preclusive effect); SACKS & KURLANTZNICK, *supra* note 55, at 121-22 (acknowledging that arbitrators may properly apply external law if the parties entered into a contract "in awareness" of an external source of law, or if the parties are advised before the external law is applied).

142. *See* FAIRWEATHER'S ARBITRATION, *supra* note 1, at 522 (employment arbitration precludes further litigation absent contractual defenses such as fraud, duress or fundamental unfairness); *see also* ELKOURI & ELKOURI, *supra*

These characteristics conflict with the public and individual purposes underlying Title I of the ADA, just as they conflict with Title VII, whose remedies the ADA incorporates.[143] First, although Congress devoted relatively little discussion to the arbitration provision in the ADA,[144] it repeatedly underscored the purely supplemental nature of arbitration, emphasizing that it did not support final and binding arbitration for ADA disputes.[145]

Other members of Congress endorsed this interpretation of the arbitration provision, observing that public policy requires that arbitration remain only supplementary to judicial resolution. These members stressed the responsibility of the federal government for enforcing the ADA's statutory protections on behalf of disabled individuals.[146] Congress, by enunciating the role of the federal government and traditional judicial remedies in fighting discrimination, expressed a fundamental mistrust of

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note 1, at 100 & n.2 (citing Postal Workers v. United States Postal Serv., 789 F.2d 1 (D.C. Cir. 1986)).

143. *See* 42 U.S.C. § 12117 (Supp. III 1991).

144. H.R. REP. NO. 485, pt. 3, *supra* note 2, at 76, *reprinted in* 1990 U.S.C.C.A.N. at 449.

145. The House Committee on the Judiciary, which introduced the arbitration provision, cautioned that "any agreement to submit disputed issues to arbitration, whether in the context of a collective bargaining agreement or in an employment contract, does not preclude the affected person from seeking relief under the enforcement provisions of this Act." *Id.* at 76, *reprinted in* 1990 U.S.C.C.A.N. at 499-500. Congress conspicuously avoided including commercial arbitration agreements in its discussion, supporting the conclusion that *Gilmer*, while correct as applied to the commercial contract in that case and while distinguishable from *Gardner-Denver*, must not extend to collective bargaining agreements and employment contracts under the ADA.

146. The Committee on Education and Labor concluded that "the unfortunate truth is that individuals with disabilities are a *discrete, specific minority* who have been insulated in many respects from the general public." H.R. REP. NO. 485, pt. 2, *supra* note 2, at 40 (1990), *reprinted in* 1990 U.S.C.C.A.N. at 322 (emphasis added). Further, the Judiciary Committee noted that "[t]he ADA provides enforceable standards addressing discrimination against individuals with disabilities and ensures that the *federal government* will play a central role in enforcing these standards on behalf of individuals with disabilities." H.R. REP. NO. 485, pt. 3, *supra* note 2, at 23, *reprinted in* 1990 U.S.C.C.A.N. at 446 (emphasis added).

Congress observed that notions of public policy have begun to recognize that "many of the problems faced by disabled people are not inevitable, but instead are the result of discriminatory policies based on unfounded, outmoded stereotypes and perceptions, and deeply imbedded prejudices toward people with disabilities." *Id.* at 25, *reprinted in* 1990 U.S.C.C.A.N. at 448; *see also supra* note 2 (describing the plight of the disabled American worker); *supra* text accompanying note 11 (noting Congress's acknowledgement that employment discrimination against disabled persons is prevalent).

compulsory binding arbitration as a satisfactory method of resolving ADA disputes, despite its willingness to permit ADA claimants to take advantage of arbitration as a supplemental "overlapping remedy."[147]

Second, the *Gardner-Denver* Court recognized that Congress "has long evinced a general intent to accord parallel or overlapping remedies against discrimination."[148] Both the ADA and Title VII permit and encourage plaintiffs to take advantage of all available fora without exhibiting a preference for federal over state courts.[149] In fact, these statutes require that a plaintiff first exhaust parallel state procedures and EEOC procedures before proceeding to suit in federal court.[150] Moreover, the ADA's remedies clearly show that even the prior EEOC and state agency proceedings authorized by Title VII[151] do not preclude the claimant from pursuing a federal suit. To hold that arbitration under a contract forecloses an ADA claimant from taking advantage of statutory procedures eviscerates the congressionally proclaimed role of the federal court system in protecting the rights of the disabled.[152]

Finally, and most importantly, the ADA, like Title VII, is a civil rights law that implicates the public's interest in its judicial enforcement.[153] The ADA concerns, in the words of *Gardner-Denver*, "an individual's right to equal employment opportunities"[154]—a right long denied to disabled individuals

147. *Cf.* Alexander v. Gardner-Denver Co., 415 U.S. 36, 47 (1974) (arbitration may serve as a "parallel" or "overlapping" supplement to judicial resolution).

148. *Id.* The Court offered not only Title VII but also the Civil Rights Acts of 1866, 1871 and 1964 as evidence that the civil rights laws attempt to provide as many fora as possible for the resolution of discrimination claims. *Id.* at 47 & n.7.

149. *See Gardner-Denver*, 415 U.S. at 47-48 & nn.7-9; *see also* 42 U.S.C. §§ 2000e-5(a)-(d) (setting forth the alternatives of state and local enforcement and EEOC enforcement); § 2000e-5(f) (providing for civil actions following EEOC determinations); § 2000e-5(a) (1988 & Supp. III 1991) (enforcement by the EEOC). The Judiciary Committee, in enacting the ADA, recognized that the availability of state fora is essential to the full enforcement of ADA rights by refusing to preempt relevant state laws. *See supra* note 11.

150. 42 U.S.C. § 2000e-5(a)-(f) (1988 & Supp. III 1991).

151. This is only true, of course, if the EEOC issues a "right-to-sue" notice under § 2000e-5(f)(1) (1988). The EEOC will not issue such a notice if it finds the claim meritorious and assumes the claim.

152. *See* 42 U.S.C. § 12101(b)(3) (Supp. III 1991) (stating that one of the ADA's purposes is "that the Federal government plays a central role in enforcing standards . . . on behalf of individuals with disabilities").

153. *See supra* note 10 for sources describing the concept of "public rights."

154. Alexander v. Gardner-Denver Co., 415 U.S. 36, 51 (1974); *see also*

who "continually encounter various forms of [employment] discrimination."[155] The means for enforcing this public right must not rest with the arbitral process because the ADA involves questions of law, not of contract interpretation. The arbitral process is insufficient because arbitrators specialize in "the law of the shop, not the law of the land,"[156] because they do apply external law in reaching decisions,[157] and because their misapplication of the law is generally not reversible error.[158] Consequently, unsatisfactory arbitral decisions that result from the erroneous application or interpretation of the ADA (and are essentially immune from appellate review)[159] are more prone to occur.[160]

Further, even when arbitrators correctly apply the ADA to employment disputes, their decisions may not appreciably deter future discriminatory conduct nor provide precedents for appropriate employer behavior.[161] Without the benefit of numerous published judicial opinions, the ADA objectives of eliminating discrimination through deterrence of discriminatory conduct[162] and of promoting the "clear, strong, consistent" standards for preventing discrimination against disabled individuals[163] will be seriously compromised, not only because many individuals who have been wronged will not bring suit,[164]

Hoyman & Stallworth, *supra* note 52, at 8 (revealing that the dignitary value of Title VII litigation is of significant importance to plaintiffs).

155. 42 U.S.C. § 12101(a)(5) (Supp. III 1991).

156. *Gardner-Denver*, 415 U.S. at 57 (citing United Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574, 581-83 (1960)).

157. *See supra* note 141 and accompanying text.

158. *See supra* note 142 and accompanying text.

159. ELKOURI & ELKOURI, *supra* note 1, at 28-32 (warning that courts are loath to overturn arbitral decisions except on the basis of fraud, bias or flagrant disregard for the terms of the contract on the part of the arbitrator); FAIRWEATHER'S ARBITRATION, *supra* note 1, at 522 (judicial review of employment arbitration awards limited to contractual challenges).

160. *See* Lobenthal, *supra* note 10, at 75-77. Lobenthal argues that when the general public has an interest in vindicating certain statutory rights, such as Title VII, the risk that arbitrators will commit unreviewable errors in applying the law results "in significant social costs." *Id.* at 77 & n.42 (citing to and discussing Richard Posner, *An Economic Approach to Legal Procedure and Legal Administration*, 2 J. LEGAL STUD. 399, 400 (1973)).

161. *See* Lobenthal, *supra* note 10, at 77; *see also* Donohue & Siegelman, *supra* note 18, at 1023-28 (an empirical discussion of the deterrent effects of antidiscrimination laws); Note, *supra* note 71, at 575 (acknowledging that allowing the employer to require arbitration of certain statutory disputes arguably creates a greater potential for employer abuse).

162. *See* 42 U.S.C. § 12101(a) (Supp. III 1991).

163. *See supra* text accompanying note 10.

164. *See* Donohue & Siegelman, *supra* note 18, at 1023 (noting that "[t]he

but also because those who do wish to pursue their grievances will lack a consistent body of law on which to base their complaints.[165]

Taken together, these concerns that arbitration under a collective bargaining agreement or employment contract cannot adequately promote the individual or public interests protected by the ADA require that the disabled individual's right to pursue her statutory remedies remain intact. All collective bargaining agreements and employment contracts within the ADA's coverage are in "interstate commerce" for purposes of the FAA and are thus not subject to compulsory arbitration under that act's strong policies favoring arbitration. Additionally, the clear congressional intent to ensure that arbitration remain supplementary to statutory remedies—to say nothing of the reasons why arbitration fails to promote public rights—demonstrates why compulsory binding arbitration is inappropriate even apart from the FAA.

III. ARBITRAL AWARDS AS VOLUNTARY SETTLEMENTS

Although Congress did not intend binding arbitration to be an exclusive remedy for ADA disputes, the language of the statute clearly shows an intention not to completely preclude arbitration of ADA disputes. Indeed, section 513 of the ADA specifically *encourages* the use of arbitration and other means of alternative dispute resolution.[166] Unless final and binding arbitration is possible in some circumstances, section 513 loses its practical significance. The preceding analysis does not preclude voluntary arbitration in every instance. The Court in *Gardner-Denver* remarked that a Title VII plaintiff could waive statutory remedies as part of a voluntary settlement, provided that

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efficacy of Title VII and many other federal antidiscrimination laws depends primarily on the willingness and ability of workers to bring private suits" but that "if discrimination victims never sue, then employers have no economic incentive to comply"). This problem becomes even more serious if many of the individuals who would ordinarily bring suit against their employers are compelled to arbitrate them instead, because the body of case law interpreting the ADA and acting as a deterrent will be further depleted.

165. *Cf.* Dowd, *supra* note 27, at 445 (observing that the arbitration of antidiscrimination law claims (in particular, the ADEA) "may frustrate the development of the exact social policies the statute was designed to implement"). *But cf.* Stewart, *supra* note 71, at 1434 (arguing that the arbitration of ADEA claims does not frustrate the statutory purposes at all because the decision to arbitrate is "voluntary").

166. 42 U.S.C. § 12212 (Supp. III 1991).

consent to the waiver was "voluntary and knowing."[167] The language of section 513, tempered by its legislative history and the policies behind the ADA, demonstrates the propriety of this "voluntary settlement" approach to interpreting the arbitration provision.

After an ADA claim arises, parties who wish to arbitrate should first attempt to agree on final and binding arbitration expressly conditioned on waiver of judicial resolution.[168] Arbitration pursuant to express waiver binds both parties, who then cannot challenge the validity of the arbitral award based on the arbitrator's incorrect interpretation of the ADA.[169] If the parties cannot agree to waive judicial resolution, however, they may pursue nonbinding arbitration with the possibility of reaching a satisfactory settlement while preserving the right to file an ADA claim.

Following this latter approach, the ADA claimant should simultaneously file a complaint with the EEOC or parallel state agency.[170] This requires that the decision to arbitrate take place within the statutorily prescribed time period for filing an ADA claim with the EEOC.[171] The EEOC investigation will then toll pending the outcome of the arbitration;[172] filing is necessary, however, to avoid later dismissal for failure to comply with the statutory procedures.

The parties may proceed with arbitration with the understanding that the arbitral decision is *not yet binding.* This practice establishes that when arbitration is complete, the ADA claimant may seek relief through federal or state processes

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167. *Gardner-Denver*, 415 U.S. at 52 & n.15.

168. The Supreme Court hinted in *Gardner-Denver* that it would find postdispute agreements to arbitrate binding as long as they expressly conditioned arbitration upon waiver of Title VII rights. *Id.*; *see also* FAIRWEATHER'S ARBITRATION, *supra* note 1, at 526 ("arbitration agreements entered into after the operative facts have occurred have a better chance of being enforced by the courts"). As explained earlier, this approach is unnecessary in the context of a commercial agreement because arbitration is authorized by the FAA. *See supra* notes 94, 106-09 and accompanying text.

169. *See generally* FAIRWEATHER'S ARBITRATION, *supra* note 1, at 388-465 (discussing methods of vacating, enforcing, or correcting an arbitral award).

170. See 42 U.S.C. § 2000e-5(a)-(e) (1988) for the proper filing procedure.

171. The employee must file with the EEOC or parallel state agency pursuant to 42 U.S.C. § 2000e-5(e)(1) (Supp. III 1991).

172. Because the ADA favors conciliatory measures over litigation, if possible, the EEOC would stay its investigation to avoid unnecessary involvement even if it finds the claim meritorious or to avoid investigation altogether in the event of a satisfactory claim that it probably would not have found meritorious. 42 U.S.C. § 2000e-5(f)(1)-(2) (1988).

under the ADA if with the arbitral award proves unsatisfactory.[173] Further, this practice ensures that the agreement to arbitrate is voluntary. A party who cannot be bound to an arbitral decision until after the award has little reason to consent to initial arbitration except voluntarily.[174]

In this regard, the arbitration resembles a settlement negotiation and comports with *Gardner-Denver*'s recognition of waiver by voluntary settlement.[175] If the arbitration produces a result satisfactory to both parties, if the employee is fully aware of her rights under the ADA, and if she is willing to forsake them, the parties have reached a settlement and the employee can then agree in writing to waive her right to pursue statutory remedies under the ADA.[176] By consenting to the arbitral award, the employee indicates sufficient satisfaction with the arbitral award and expresses her willingness to forgo judicial resolution. Thus, if the employee is later dissatisfied with the award—perhaps as a consequence of subsequent events in the workplace, or after mere reflection—and sues to overturn the arbitral award, the court may enforce the award on general contract principles, based on the postarbitral agreement.

This proposed method of satisfying the impetus behind encouraging nonjudicial dispute resolution while preserving the employee's substantive rights under the ADA is not without its flaws. It is certainly skewed in favor of protecting the employee.[177] Moreover, it is somewhat time consuming because in the event that a dispute results litigation, the arbitral process

173. The EEOC or parallel state investigation has only tolled during the arbitral period and should begin again following the arbitral decision.

174. This in turn satisfies the ADA's requirement that arbitration be "purely voluntary." HOUSE RECORD, *supra* note 22, at H2421-22.

175. *Gardner-Denver*, 415 U.S. at 51-52.

176. To avoid later confusion over the informed nature or voluntariness of the employee's decision to sign a postarbitral agreement, the agreement should advise the employee to see an attorney, should include an explicit statement of the ADA rights and a waiver of these rights, and should provide a reasonable time period for revocation, such as the limits set forth in the waiver provision of the ADEA, 29 U.S.C. § 626(f) (Supp. III 1991).

177. Critics of the "voluntary settlement" approach may argue that postarbitral agreements unduly favor employees because dissatisfied employees will never sign postarbitral agreements not to litigate unless they realize there is no hope for victory in court. This may be true in some instances, but not in all such cases. Moreover, postarbitral agreements are no less legitimate merely because they favor employee satisfaction over employer victory. Because ADA rights are of paramount importance to the individual and to society, a "voluntary settlement" approach that gives the individual two chances at dispute resolution is consistent with the purposes underlying the ADA. *See supra* notes 145-63 and accompanying text.

amounts to little more than a lengthy delay. These difficulties do not, however, strip the "voluntary settlement" method of confirming an arbitration award of its value.

First, although the "voluntary settlement" approach usually favors the employee, it does not always do so.[178] Certainly, a dissatisfied employee with a real grievance will not sign the postarbitral agreement not to litigate. Despite this, not all ADA grievances that proceed to unsuccessful arbitration will result in subsequent litigation just because the employee was dissatisfied. For example, should the factfinding process of arbitration convince the employee that perhaps her claim could not withstand judicial analysis, she will abandon her ADA claim. In such a case, arbitration relieves the employer, the EEOC, and the court system of the costly and time-consuming burden of investigating and litigating an unmeritorious ADA claim. Further, should the *employer* leave arbitration dissatisfied, nothing in the "voluntary settlement" approach requires it to sign the postarbitral agreement.[179] The employer remains equally free to refuse to sign the agreement and to free the employee to pursue her statutory remedies, if the employer believes that it will fare better as a defendant in court than across the arbitration table.

Finally, the "voluntary settlement" approach does not require that the parties reach the same result as they would in court; thus, the size of an adequate award will often be smaller than the value of a court judgment. This is true because employees will likely accept a lower award than they could perhaps obtain in court to avoid hostile and costly litigation. Similarly, employees, unless they appear pro se before the courts, must take into account attorney's fees and court costs in the event of a loss. Finally, because litigation is time-consuming, the parties may agree to sacrifice some of the possible benefits of the ADA remedies for the relative efficiency of arbitration.

This "voluntary settlement" approach, though skewed in

178. Employers may also benefit from arbitration even if they have to pay, because the costs are lower, because the forum is less hostile, and because the stigma of losing at arbitration is lower, from a dignitary standpoint, than that of being judged a discriminator in court.

179. As a practical matter, the employee probably decides whether to be bound or not to the arbitral agreement since she is the party with the statutory rights under the ADA. Even so, the settlement approach does not act as a "one-way ratchet"—a dissatisfied employer who loses more than she thinks she will lose in litigation may refuse to sign.

the employee's favor, ensures that pursuing final and binding arbitration is "appropriate" for purposes of the ADA. In addition to providing employers with a fair mechanism for enforcing voluntary arbitration awards, it gives ADA plaintiffs the opportunity to submit disputes to arbitration without the risk of losing the right to statutory relief. Further, it recognizes that arbitration, used properly, may advance the goals of the ADA by providing more efficient, less antagonistic, and less costly relief to plaintiffs who wish to take advantage of alternative dispute resolution.

CONCLUSION

The ADA manifests a congressional intent to favor speedier and less expensive dispute resolution through arbitration and other alternative means of dispute resolution when the parties voluntarily and knowingly consent. Courts should be wary, however, of attaching too much significance to this encouraging language. The exception for "contracts of employment" under the FAA demonstrates that compulsory arbitration is not "authorized by law." In addition, the policies behind the ADA require that the only "appropriate" use of binding arbitration is the "voluntary settlement" that permits parties to agree to be bound only after arbitration. By balancing the employee's judicially enforceable right to be free from discrimination with the court's and employer's interests in promoting less expensive and time-consuming means of dispute resolution, the "voluntary settlement" approach to arbitration takes advantage of the best of both alternatives by providing arbitration as an attractive and convenient form of relief while preserving the vital public policies underlying the ADA.